

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs August 26, 2008

**ALLEN P. BLYE v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Sullivan County  
No. C48, 928     R. Jerry Beck, Judge**

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**No. E2007-01605-CCA-R3-PC - December 19, 2008**

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In this appeal, the petitioner, Allen P. Blye,<sup>1</sup> challenges his unsuccessful collateral attack via post-conviction petition for his convictions for theft and other offenses as reflected in case assignment C48, 928. On appeal, the petitioner contends that: (1) the post-conviction court incorrectly ruled on the petitioner's issue regarding his unknowing rejection of a "possible" plea deal in connection with his theft convictions reflected in case C48, 928, and his aggravated rape and aggravated burglary convictions reflected in case C50, 328; (2) the post-conviction court improperly refused to allow the petitioner to further amend his petition to challenge the trial court's sentencing decision in light of *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) (*Gomez II*); and (3) the post-conviction court erred in its refusal to grant the petitioner's oral motion to recuse due to an apparent preconception or bias by the court. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court denying post-conviction relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

C. Brad Sproles, Kingsport, Tennessee, for the appellant, Allen P. Blye.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Joseph Eugene Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS AND PROCEDURAL BACKGROUND**

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<sup>1</sup>Throughout the record, the petitioner's name has been spelled "Allan P. Bly," "Allen P. Blye," Allen Prentice Bly," and "Allen Prentice Bly." We have determined to spell the petitioner's name consistent with the style of the petitioner's petition.

This appeal arises from a denial by the post-conviction court of the petitioner's petition for post-conviction relief as it relates to the petitioner's convictions for theft and other offenses reflected in case assignment C48, 928. The following is a summary of the procedural history and facts of the case taken from this court's opinion on direct appeal:

The defendant, Allen Prentice Blye, was charged under two separate indictments with a total of fourteen offenses. The indictments were consolidated for trial and the defendant was convicted of all five counts contained in indictment number S41,733 and four counts contained in indictment number S41,774. The defendant was found not guilty on the remaining five charges contained in indictment number S41,774. The trial court imposed the following sentences:

{L1-2}Indictment S41,733

Count 1	Theft over \$10,000.00 (S.Loflin)	15 years at 45%
Count 2	Felony evading arrest	6 years at 60% (consecutive)
Count 3	Reckless endangerment	6 years at 60% (consecutive)
Count 4	Driving on a revoked license	6 months (concurrent)
Count 5	Leaving the scene of an accident	30 days (concurrent)

{L1-2}Indictment S41,774

Count 2	Theft over \$500.00 (Gafford)	6 years at 60% (consecutive)
Count 4	Theft under \$500.00 (S.Loflin)	11 months, 29 days (concurrent)
Count 6	Theft over \$500.00 (Carroll)	6 years at 60% (consecutive)
Count 9	Theft over \$1,000.00 (Mann)	12 years at 60% (consecutive)

The effective sentence under indictment S41,733 is 27 years and the effective sentence under indictment S41,774 is 24 years. The trial court ordered the sentences under each indictment to be served consecutively, for a total effective sentence of 51 years. In this appeal, the defendant presents the following issues: (1) whether the trial court erred by refusing to sever certain of the offenses; (2) whether the evidence was sufficient to support the conviction for theft over \$1,000; and (3) whether the sentence was excessive. Because the defendant was entitled to separate trials on some of the counts contained in indictment S41,774, and the error cannot be classified as harmless, the four convictions under that indictment must be reversed and remanded. The convictions and accompanying sentences under indictment S41,733 are affirmed.

On the morning of July 31, 1998, Alfred Mann of the Colonial Heights area in Sullivan County discovered that his silver 1987 Volkswagen Scirocco sports car, valued at between \$5,000 and \$6,000, had been taken from his front lawn. He had left his keys in the vehicle.

On August 8, 1998, Samuel Loflin, whose company, Freeman Glass, owned a 1997 GMC Yukon and a 1994 Ford F-250 pickup truck, discovered that the Yukon had been taken from his driveway in the Preston Forest Subdivision in Kingsport. The Yukon had a value of over \$10,000. Two drills and a suction cup for holding glass, having a cumulative value of over \$500, were missing from the Ford truck.

That same morning, Samuel Loflin's son, Tom, who lived next door to his father, discovered that someone had broken into his Pontiac Grand Prix. The passenger door had been left open and the contents of the glove compartment and the center console had been removed and left on the seats. Debra Lynn Clasin, who lived directly across the street, found that the trunk of her daughter's Mazda automobile had been left open. The console and glove compartment of the vehicle were also open and the contents were scattered throughout the interior of the car.

Also that same morning, Brian Carroll, who lived in the same subdivision as the Loflins, discovered that the door to his Chevrolet S10 pickup truck, which was parked in his carport, had been opened and the contents of the truck were in disarray. An amplifier, a subwoofer box, and compact discs were missing. The property had a cumulative value of approximately \$1,500.

The next day, Joe Aaron Gafford, a Church of Christ minister, returned from vacation and discovered that his residence, which was located adjacent to Preston Forest subdivision, had been burglarized and ransacked. A light was left on in the residence, which had been locked during Gafford's absence. The carport door had been pried open and left ajar. Drawers and cabinets were open throughout the house. A baby ring, two VCRs, two cameras, a portable television, a microwave, \$200 in cash, and several drawers from a jewelry armoire had been taken. Gafford estimated that the cumulative value of the stolen property was in excess of \$1,000. All of the property taken was later recovered.

Mary Elizabeth Snapp, who had been dating the defendant, met him at an office complex where he was doing interior cleaning on August 8, 1998. Sometime after dark, each left in separate cars. According to Ms. Snapp, she followed the defendant, who was driving a two-door silver sports car, to a Winn-Dixie parking lot, where he opened the trunk of his car and gave Ms. Snapp a VCR and a baby ring. She took the items to her apartment. At approximately 3:00 A.M. the next morning, the defendant drove to Ms. Snapp's apartment in the silver sports car. The defendant then drove Ms. Snapp to a friend's house where she waited 30 minutes to an hour. When the defendant returned, he was driving a green GMC Yukon, which was later identified as that stolen from Sam Loflin. Ms. Snapp joined the defendant in the Yukon. Shortly after their departure, the defendant picked up a man whose car was out of gasoline and drove him to a convenience market. When a police officer arrived, the defendant drove away, leaving the man at the pump. Afterward, another police vehicle followed the Yukon until the defendant drove down a dead-end road, where he and Ms. Snapp waited for several minutes. A short while later, another

officer saw the Yukon and began to follow. According to Ms. Snapp, the defendant sped away, drove through a roadblock, and eventually missed a curve and crashed into a house. The defendant fled on foot, leaving Ms. Snapp in the car. When questioned by police, Ms. Snapp initially denied any knowledge of the defendant. When told she might not see her children anymore, however, she cooperated by making a statement and showing officers the location of the VCR and baby ring. A search of Ms. Snapp's apartment yielded the VCR and baby ring belonging to Gafford.

Sergeant Dan Brookshire of the Kingsport Police Department was looking for the stolen Yukon when he saw a vehicle fitting that description at the gas pumps at a convenience market. After calling for assistance from other officers, Sergeant Brookshire observed the defendant hurriedly drive away, leaving a passenger standing at the gas pump. Sergeant Brookshire followed closely behind but lost sight of the vehicle.

Shortly after receiving the call from Sergeant Brookshire, Officer Timothy Horne saw the Yukon being driven by the defendant and followed. Before Officer Horne could initiate a traffic stop, however, the defendant accelerated, jumped the curb in a church parking lot, and sped away. The defendant did not stop when Officer Horne activated his lights, but continued to accelerate and eventually ran a stop sign. At another intersection, the defendant drove through a flashing red light and sped up to 70 miles per hour while straddling the double yellow centerline and driving into oncoming traffic.

Officer Kevin Hite, who had also learned of the high speed chase, was forced to evade the defendant as they approached each other in opposite directions. The Yukon driven by the defendant went "slightly airborne" and struck the spotlight on the side of Officer Hite's cruiser. Officer Horne continued his pursuit and saw the defendant drive through a stop sign and a red light before crashing the Yukon into the side of a residence. The defendant fled on foot but was arrested by police, who returned him to the scene of the accident.

Detective Frank Light found compact discs belonging to Carroll in the Yukon. The Volkswagen Scirocco which had been taken from Mann was discovered in an apartment complex near Gafford's residence. Three of the four drawers taken from Gafford's jewelry armoire were inside the Scirocco, as were his VCR and microwave. The two drills belonging to Sam Loflin, all of Carroll's stereo equipment and some of his compact discs were also in the Scirocco. At trial, the defendant stipulated that his driver's license had been suspended or revoked at the time of the arrest.

*State v. Allen Prentice Blye*, No. E2001-01375-CCA-R3-CD, 2002 WL 31487524, \*1-3 (Tenn. Crim. App., at Knoxville, Nov. 1, 2002), *perm. app. denied* (Tenn. Mar. 10, 2003). As noted, the petitioner's convictions arising from indictment number S41,733, and accompanying sentences were

affirmed on direct appeal. Of significance, the petitioner, in a separate case, was convicted by jury of aggravated burglary and aggravated rape wherein he was sentenced as a Range III, persistent offender to fifteen years for the aggravated burglary, and as a Range II, violent offender to forty years for the aggravated rape.<sup>2</sup> The petitioner's convictions and sentences for aggravated burglary and aggravated rape arising from indictment number S42,293 were affirmed on direct appeal. *See State v. Allen Prentice Blye*, No. E2001-01227-CCA-R3-CD, 2002 WL 31086314 (Tenn. Crim. App., at Knoxville, Sept. 19, 2002), *aff'd*, 130 S.W.3d 776 (Tenn. 2004).

The petitioner filed a timely pro-se petition for post-conviction relief. The petition consisted of approximately one-hundred pages of handwritten and typed arguments, photocopies of newspaper clippings, and random excerpts of case law. Subsequently, the post-conviction court assigned counsel to the petitioner and allowed the original petition to be amended in effort to comply with the requirements of the Post-Conviction Procedure Act. Following three amendments, the petitioner's post-conviction claims were consolidated to reflect assignment of errors involving the petitioner's convictions for theft and other offenses reflected in case assignment C48, 928; and the petitioner's convictions for aggravated rape and aggravated burglary reflected in case assignment C50, 328. Noteworthy, the petitioner's third amendment to his petition on February 17, 2006, states that all issues in case C48, 928 are "wholly subsumed by this Third Amendment to Petition for Post Conviction Relief" and it represents "the entirety of Petitioner's claims." The amendment then alleges that the petitioner was denied the effective assistance of trial counsel in case C48, 928. From the available record, it appears that evidentiary hearings were held on December 11, 2006, January 29, 2007, and March 12, 2007.

The January 29, 2007, hearing transcript included in this appellate record reflects that the post-conviction court concluded the evidentiary hearing with regard to the petitioner's post-conviction claims in C48, 928 on December 11, 2006. However, the December 11, 2006 transcript is not included in the record for our review. At the January 29, 2007 and March 12, 2007 hearings, the petitioner presented his proof for his claims regarding his convictions for aggravated rape and aggravated robbery reflected in C50, 328.<sup>3</sup> During those hearings, the petitioner through counsel moved the post-conviction court to recuse itself based on the petitioner's belief that the court had already formed an opinion as to the petitioner's truthfulness prior to hearing all the proof. The court inquired as to the factual basis for the oral motion wherein counsel replied, "Judge, I can't say word-for word." In response, the court denied the motion as no proof was alleged to support the motion. At the January and March hearings, the petitioner's testimony and proof centered entirely on his allegations of ineffective assistance of counsel as to case assignment C50, 328.

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<sup>2</sup> From the record, we glean that the jury returned guilty verdicts on July 28, 2000 for the theft and various offenses reflected in case numbers S41,733, S41,774. In a separate trial, the jury returned guilty verdicts on January 19, 2001 for the aggravated rape and aggravated burglary offenses reflected in case number S42,293. A joint sentencing hearing was held for the petitioner's convictions arising out of S41,733, S41,774, S42,293. For purposes of seeking post-conviction relief the petitioner's convictions arising out of S41,733 were assigned case number C48,928, and the petitioner's convictions arising out of S42,293 were assigned case number C50,328.

<sup>3</sup> The petitioner is pursuing a separate appeal regarding the denial of his post-conviction petition in C50,328.

Following the various evidentiary hearings, the post-conviction court issued separate orders denying post-relief in cases C48, 928 and C50, 328. For case C48, 928, the court denied the petitioner relief on June 20, 2007. The petitioner now brings the instant appeal for case C48, 928.

### ANALYSIS

On appeal, the petitioner presents three issues for review. First, the petitioner purports to argue that his trial counsel failed to properly advise him about his offender status prior to his sentencing hearing for cases C48, 928 and C50, 328, which caused him to reject a “possible” plea offer which would resolve both cases. Second, the petitioner argues that the post-conviction court should have allowed him to further amend his petition on June 28, 2007, in order to challenge the trial court’s sentencing decision in light of *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007) (*Gomez II*). Finally, the petitioner asserts that the post-conviction court erred in its refusal to grant the petitioner’s oral motion to recuse itself due to an apparent preconception or bias by the court.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations of fact set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court’s findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court’s factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court’s legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

The petitioner has waived all of his issues presented in this appeal. To begin, the petitioner has failed to provide this court with a copy of the transcript of the post-conviction evidentiary hearing on December 11, 2006, wherein the petitioner’s claims regarding case C48, 928 were presented and heard. It is the petitioner’s duty to ensure that the record on appeal contains all of the evidence relevant to those issues which form the basis of the appeal. *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993); *see* Tenn. R. App. P. 24(b). “Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies,” this court cannot consider the merits of that issue. *Id.* at 560-61. Accordingly, the petitioner’s failure to include a complete transcript of the proceedings forming the basis of this appeal results in waiver to any challenge of the lower court’s rulings. *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991) (“[i]n the absence of an adequate record on appeal, this court must presume that the trial court’s rulings were supported by sufficient evidence.”); *State v. Draper*, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990). Additionally, all issues are waived as a result of the petitioner’s failure to cite to the record. *See* Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 27(a)(7).

We would also point out that the petitioner did not raise these specific issues in his final amended post-conviction petition for case C48, 928. For an example, the petitioner’s issue regarding the post-conviction court’s denial of his motion to further amend the petition to include a challenge to the trial court’s sentencing decision in light of *Gomez II* was filed June 28, 2007, approximately

three months after the conclusion of the last evidentiary hearing in March of 2007 and about seven days after the post-conviction court had filed its ordering denying relief in case C48, 928. When a petitioner raises an issue for the first time on appeal, that issue is waived. *See Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996). Furthermore, a petitioner may not change theories between the lower court and the appellate court. *State v. Alder*, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001). Accordingly, based on the forgoing reasons, the petitioner's issues in the instant appeal are waived.

### **CONCLUSION**

Based on the foregoing, the judgment of the post-conviction court denying relief in case number C48, 928 is affirmed.

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J.C. McLIN, JUDGE